

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELO GERROD CHANDLER,

Defendant-Appellant.

UNPUBLISHED

March 17, 2009

No. 281763

Muskegon Circuit Court

LC No. 06-054255-FH

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of possession with intent to deliver greater than 50, but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii); felon in possession of a firearm, MCL 750.224f; felony-firearm, MCL 750.227b; and domestic violence, MCL 750.81(2). Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 17 to 30 years' imprisonment for his possession with intent to deliver conviction, 1 to 7 ½ years' imprisonment for his felon in possession of a firearm conviction, two years' imprisonment for his felony-firearm conviction and credit for time served for his domestic violence conviction. We affirm defendant's convictions, but vacate his sentence on possession with intent to deliver and remand for resentencing. Additionally, we vacate that portion of defendant's sentence ordering reimbursement for attorney fees and remand for reconsideration in light of defendant's current and future ability to pay.

Defendant first contends that the trial court improperly admitted evidence of other bad acts. He argues that MRE 404(b) barred the admission of evidence that defendant had sold drugs to Amy Frees from January 2006 to April 2006, seven months prior to the charged offenses. "The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) (citations omitted).

Pursuant to MRE 404(b), evidence of other acts committed by a defendant is inadmissible "[i]f the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question." *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). For evidence to be properly admissible under MRE 404(b), the evidence must be offered for a

proper purpose, the evidence must be relevant, the trial court must determine that the probative value of the evidence substantially outweighs the potential of unfair prejudice, and the trial court must issue a proper limiting instruction to the jury. *Id.* at 74-75.

In the present case, the trial court admitted the evidence of past drug dealing to prove both that defendant intended to sell the drugs found and that he knew that the drugs were present in the apartment. Thus, the evidence was admitted for purposes proper under the plain language of MRE 404(b). Moreover, because defendant pleaded not guilty to the crime of possession with intent to deliver, the prosecution was permitted to introduce other acts evidence pursuant to MRE 404(b) to prove any element of the charged crime. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Further, Frees' testimony was highly probative of defendant's intent to deliver the drugs. There is no doubt that Frees' testimony was prejudicial to defendant in that it described the terrible consequences of her drug addiction and, like so much prior bad acts testimony, at least raised the specter of propensity evidence. However, MRE 403 requires exclusion only where the probative value is "substantially outweighed" by the danger of unfair prejudice. After review of the record, we are not convinced that the probative value of this evidence was substantially outweighed by its prejudicial impact in this case. Finally, our review of the record reveals that the trial court gave a proper limiting instruction to the jury. *VanderVliet, supra* at 74-75. Because the evidence was admitted for a proper purpose, relevant, and its probative value was not substantially outweighed by its prejudicial impact, and because the trial court issued a cautionary instruction, we reject defendant's claim that the admission of Frees' testimony was reversible error.

Next, defendant argues that the trial court impermissibly admitted evidence of defendant's financial status to establish a motive for the crime. We disagree. Although "[e]vidence of poverty, dependence on welfare or unemployment is not admissible to show motive or as evidence of a witness's credibility," *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986), "[o]ther evidence of financial condition may, however, be admissible in the circumstance of a particular case," *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). The record clearly demonstrates that evidence of defendant's unemployment and financial status was relevant because it allowed the inference that defendant's otherwise unexplained income was generated by cocaine sales. As noted by the trial court, "possession of money and lack of a job would have some relevance." Thus, the evidence was properly used to prove intent to sell drugs and to reinforce the prosecution's theory that defendant was engaged in drug trafficking; not to show motive. Further, even though the evidence was prejudicial, it was also highly probative and this probative value outweighed any prejudicial effect. Accordingly, the trial court did not abuse its discretion when it admitted this evidence.

Defendant also argues that the trial court abused its discretion when it admitted evidence that defendant failed to return to the courtroom following a break on the first day of his original trial. We disagree. "It is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The record establishes that on the first day of his original trial defendant fled from the court proceedings after learning that a lay witness was prepared to testify against him. Such evidence is probative on the issue of guilt and, therefore, the trial court did not abuse its discretion when it admitted this evidence. *Id.* Further, the trial court did not abuse its discretion when it gave a

flight instruction to the jury because there was evidence to support such an instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

Defendant next contends that he must be granted a new trial because drug profile evidence was improperly used as substantive evidence of guilt. We disagree. We review defendant's unpreserved claim for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). For expert testimony concerning criminal activity to be admissible, "(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline." *People v Murray*, 234 Mich App 46, 53-54; 593 NW2d 690 (1999), quoting *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).

The record indicates the expert testimony was permissibly introduced as an educational tool to help the jury understand drug transactions and that the evidence was only used for this purpose. *Id.* at 52-53. The expert testified about the drug trade, but did not give a "dealer profile." Additionally, the expert made no mention of defendant. He neither compared what he knew with the circumstances of the case, nor offered any opinion about defendant's guilt. Accordingly, the record does not support a finding that the evidence was used to prove defendant's guilt. We note that, although the trial court failed to give a proper limiting instruction regarding the proper use of the expert evidence, reversal is not necessary because defendant does not explain how the trial court's failure to properly instruct the jury was outcome determinative, and such a conclusion is not supported by the record, particularly given that the prosecutor never argued that defendant's guilt could be inferred from the expert evidence alone.

Defendant next contests his sentences for firearm possession and possession with intent to deliver. We look first at the arguments related to both sentences.

Defendant argues that he is entitled to resentencing because the trial court failed to assess defendant's rehabilitative potential as required by MCR 6.425(A)(5), and therefore based defendant's sentences on inaccurate information. MCR 6.425(A)(5) only requires that the presentence investigation report (PSIR) include information about a defendant's medical and substance abuse history. In the present case, the PSIR included this information. Therefore, there is no error. Defendant's attempt to secure resentencing in light of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), must also fail as *Blakely* has no application to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006).

Looking specifically at defendant's firearm possession conviction, under MCL 769.34(10), if a defendant's minimum sentence "is within appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Defendant has not alleged scoring errors, and although defendant makes some complaints about the accuracy of information, he did not dispute the accuracy of the information at sentencing. Because the minimum sentence for this conviction was within the guidelines, this Court must affirm defendant's sentence. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003); MCL 769.34(10). In addition, for this particular sentence, defendant argues the trial court failed to state how the sentence was proportionate to the crime. A minimum sentence within the sentencing guidelines is presumed proportional. *People v*

Powell, 278 Mich App 318, 323; 750 NW2d 607 (2008). Because the sentence was within the guidelines, the trial court was not required to state how the sentence was proportional. *Id.*

Moving to defendant's sentence for his possession with intent to deliver conviction, a trial court must either select a minimum sentence within the guidelines range or state "substantial and compelling" reasons to justify a sentence that departs from the guidelines range. *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003); MCL 769.34(3). A reason is "substantial and compelling" if it is objective and verifiable and it "keenly or irresistibly" engaged the court's attention. *Id.* at 257. "We review for clear error the trial court's cited factors supporting its departure, we review de novo whether the factors are objective and verifiable, and we review for an abuse of discretion the trial court's determination that the factors constitute substantial and compelling reasons to depart from the recommended range." *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008).

Defendant was sentenced to 17 to 30 years' imprisonment for his possession with intent to deliver conviction. The sentencing guidelines recommended a minimum sentence range of 78 months (6½ years) to 162 months' (13½ years) imprisonment. The trial court departed upward from the guidelines recommendation and stated it was doing so in light of defendant's flight from prosecution and defendant's attempts to suborn perjury by asking a witness to change her testimony, not show up to testify at trial, and by arguably threatening her. These factors are considered under offense variable (OV) 19, for which defendant was scored 10 points.¹ MCL 777.49. Under OV 19, points are scored for interference with justice, which includes flight, see *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003), and also for use of force or threat of force against another person to interfere with or attempt to interfere with the administration of justice. MCL 777.49(b) and (c). Trial courts may not depart from the guidelines range based on an offense or offender characteristic already considered in the guidelines range unless the court finds based on facts in the record that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Here, the trial court gave no indication that these factors were somehow given inadequate weight under the guidelines such that an additional 3 years was a more proportionate sentence. In fact, examining the guidelines, the highest minimum defendant could have received as enhanced for a habitual offender second offense, was still less than 17 years.² Thus, defendant's 17-year minimum sentence could never fall within the guidelines. On the record, we cannot conclude that factors already considered under OV 19 support the trial court's upward departure from the sentencing guidelines. See *People v Smith*, 482 Mich 292, 307; 754 NW2d 284 (2008). Accordingly, we vacate defendant's sentence for possession with intent to deliver and remand to the trial court for resentencing.

¹ It appears defendant could have been scored 15 points rather than 10, based on his threats against the lay witness, which were clearly an attempt to interfere with the administration of justice. MCL 777.49(b). However, this change in scoring would not change the sentencing guidelines.

² If defendant's OV and PRV scores corresponded to the E-VI, F-V, or F-VI cells on the grid, the maximum would be 160 months, which would be increased to 200 months under MCL 777.21(a).

Finally, defendant contends the trial court erred when it required defendant to reimburse the county in the amount of \$750 for the cost of his public defender, without first considering defendant's ability to pay. We agree. A trial court may require a defendant to reimburse the county for the costs of the defendant's court-appointed attorney so long as the fee bears a relationship to defendant's ability to pay. *People v Trapp (On Remand)*, 280 Mich App 598, 601; ___ NW2d ___ (2008); *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004). Because of the trial court's failure to place any indication on the record that defendant's ability to pay was considered before it imposed the reimbursement obligation, we vacate the portion of the judgment that requires defendant to pay \$750 to reimburse his attorney fees, and remand for reconsideration of the matter in light of defendant's ability to pay.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Brian K. Zahra

/s/ Douglas B. Shapiro